In The

Supreme Court of the United States

October Term, 1978

NO. 78-161

STATE OF IOWA, STATE CONSERVATION COMMISSION of the STATE OF IOWA,
Petitioners,

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, R. G. P. INCORPORATED, DARREL L., HAROLD M. AND LUEA SORENSON, HAROLD JACKSON, OTIS PETERSON AND TRAVELERS INSURANCE COMPANY,
Respondents (Petitioners on Separate Petitions),

vs.

OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA,
Respondents.

BRIEF OF AMICI CURIAE IN SUPPORT OF THE STATE OF LOWA

States of Indiana, Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming

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AUTHORITY TO FILE AMICI CURIAE BRIEF

The States of Indiana, Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North

Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming, through their Attorneys General, respectfully submit this joint brief as amici curiae under the authority of Rule 42 (4), United States Supreme Court Rules. It is in support of the Brief of the State of Iowa and the State Conservation Commission of the State of Iowa on Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit granted November 13, 1978.

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INTEREST OF AMICI CURIAE

The basic interest of the *amici* states is described by this Court in *Martin v. Waddell,* 41 U. S. 367 (16 Pet. 1842) as follows:

> For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and soils under them for their own common use, subject only to the rights since surrendered by the constitution to the general government . . . 41 U. S. at 410.

While the states are subject to the right of the Congress to regulate commerce among the states, United States Constitution, art. I, § 8, the bed and bank of navigable waters to the ordinary high water mark is reserved to the several states. *Pollard's Lessee v. Hagan,* 44 U. S. 212, 230 (3 How. 1845); *Mumford v. Wardwell,* 73 U. S. 423, 436 (6 Wall. 1867). States admitted to the Union since the Revolutionary War have acquired full title to the bed and bank of navigable waters to the ordinary high water mark by virtue of the equal footing doctrine incorporated

in their admission acts. *Shively v. Bowlby,* 152 U. S. 1, 26 (1843); *Bonelli Cattle Co. v. Arizona,* 414 U. S. 313, 318 (1973).

The title the states thus acquired was:

> ". . . held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shellfish as floating fish. . . . [citations omitted]. *The State holds the propriety of this soil* for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of that fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. *This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held. . . .* [citations omitted]". *Smith v. Maryland,* 50 U. S. 71, 74-75 (18 How. 1855). (Emphasis supplied.)

It was also a title

> ". . . different in character from that which the State holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. *It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein* freed from the obstruction or interference of private parties. . . ." *Illinois Central Railroad v. Illinois,* 146 U. S. 387, 452 (1892). (Emphasis supplied.)

As to the portion of the Missouri River that forms the general boundary between Iowa and Nebraska, Iowa claims sovereign ownership and jurisdiction over the bed

and bank of that River from the boundary to the ordinary high water mark in Iowa. This Court has recently affirmed the basis of such claim in *Oregon v. Corvallis Sand and Gravel Co.*, 429 U. S. 363, 370 (1977) holding,

> "... Although Federal law may fix the initial boundary line between fast lines and the river beds at the time of a State's admission to the Union, the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasance by operation of any doctrine of federal common law."

In regard to Iowa, the Eighth Circuit has divested that state of sovereign title by an application of what it claims is federal common law rejecting specifically the application of state laws thereon. The *amici* states find themselves threatened by this invasion of sovereignty and unable to reconcile this case with this Court's holding in *St. Louis v. Rutz,* 138 U. S. 226, 242 (1891):

> "The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi River, extends to the middle thread of the stream, or only to the waters edge, is a question in regard to a rule of property, which is governed by local law. (Citing cases)."

or the case of *Joy v. St. Louis,* 201 U. S. 332, 342, 343 (1906):

> "In this case the real dispute, as stated by the plaintiff, is whether plaintiff is entitled to the land formed by accretion, which has taken place many years since the patent was issued and since the acts of Congress were passed.
>
> • • •
>
> "As the land in controversy is not the land described in the letters patent or the acts of Congress, but, as is stated in the petition, is formed by accretions or gradual deposits from the river, whether such land belongs to the plaintiff is, under the cases just cited, a matter of local or state law, and not one arising under the laws of the United States."

The possibility of harmful and unjust results from this application of the Eighth Circuit's interpretation of the choice of law and federal common law is magnified by the use of 25 U. S. C. § 194 to cast the burden of proof upon the "white person" whether that "person" be a claimant or defendant. The Eighth Circuit concluded that "white person" included not only the individual parties to this action, which included corporations, but one of the sovereign states as well, namely Iowa. The potential scope of this case's holding could affect sovereign land title to millions of acres of State land throughout the United States. For these reasons, the *amici* states respectfully request that their contentions be considered with those of the State of Iowa.

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BRIEF OF AMICI CURIAE

QUESTIONS PRESENTED

1. Whether the Eighth Circuit's application of 25 U. S. C. § 194 creates a predisposition contrary to the judicial standards of the Supreme Court.

2. Whether the holding of the Eighth Circuit is contrary to congressional intent in enactment of 25 U. S. C. § 194.

3. Whether the holding of the Eighth Circuit that Federal Common Law, not State Law, applies is erroneous.

4. Whether the Eighth Circuit's interpretation of Federal Common Law of accretion and avulsion is erroneous.

5. Whether the Eighth Circuit erred in reversing the trial court's findings of fact.

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SUPPLEMENTARY STATEMENT OF THE CASE

The *amici* adopt the statement as set forth in the State of Iowa's Brief.

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ARGUMENT

I.

The Eighth Circuit's application of 25 U. S. C. § 194 creates a predisposition contrary to the judicial standards of the Supreme Court.

The statute at issue herein is 25 U. S.C. § 194 (hereinafter § 194) which states:

> "In all trials about the right of property in which an Indian may be a party on one side and a white person on another, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

The district court (Judge Bogue) considered that provision in the following manner:

> "The above quoted provision is, by its terms, triggered when an Indian person in a title dispute has offered evidence to show previous possession or ownership of the land in question. In this case, Plaintiffs could make out such a *prima facie* case by establishing that the land now within the Barrett Survey Line of the Blackbird Bend Area is land (or accretions to such land-in-place) left undisturbed and in place through and following an avulsive change of the river channel. If Plaintiffs establish this fact, however, they have not only triggered the application of 25 U. S. C. § 194 but also have proved their entire case and establish their right to relief in the form of decree quieting title. On the other hand, if the land now within the Barrett Survey line is land which has accreted to the Iowa shore as Defendants claim, then the land which the Tribe possessed and owned at the time the Omaha Reservation was established has been washed away and replaced. If the evidence supports a finding that the land in question is accretion land to the Iowa shore, then Defendants have proved their case as well as overcome any burden which 25 U. S. C. § 194 might place upon them. In that event, the land now within the Barrett Survey Line simply would not be the land which the tribe once possessed and owned, although it would occupy the same location. In short, the question of whether 25 U. S. C. § 194 applies in this case is inextricably entwined with the merits."

The Eighth Circuit responded:

> "We reject this reasoning."
>
> "Application of § 194 is not a self-answering inquiry to the issues at hand. [Footnote omitted.] To hold otherwise, one must presume that the reservation land has in fact been destroyed. Furthermore, the trial court's reasoning would negate the application of the § 194 statutory burden upon a pleading that simply recites Indian land had been destroyed by the erosive action of the river. Thus, under the trial

court's rationale a party making a claim to Indian land could defeat the congressional mandate by mere allegation without proof." (Appendix to Petition pp. A20-A21).

The reasoning of the Eighth Circuit in rejecting Judge Bogue's analysis of the application of § 194 creates legal precedent far more dangerous and less persuasive than that of the district court.

The Eighth Circuit is saying, in effect, "So that we can apply § 194, we will presume there was an avulsion in this case." They make that assumption despite the fact that neither federal common law [*Nebraska v. Iowa,* 143 U.S. 359 (1892); *Louisiana v. Mississippi,* 384 U.S. 24 (1966)] nor Nebraska law as applied below by Judge Bogue (Appendix to Petition, pp. C8 to C17), favor or presume avulsion change of a river. Indeed Iowa common law presumes accretion when a river has moved. (Appendix to Petition pp. A24 and C18).

It almost appears as though the Eighth Circuit decided to use whatever presumptions were necessary to apply § 194. The decision follows a protectionist sentiment—a remnant of times when Indians were underrepresented, if represented at all.

This Court has long interpreted language in Indian Treaties and the statutes approving them in such a way as to resolve any ambiguities in favor of the Indian Tribe involved. *Antoine v. Washington,* 420 U.S. 194 (1975). This too has caused considerable problems in lower court statutory interpretations which involve Indians, but not treaties or approval legislation. Even giving "the broadest possible scope" to the rule by which

ambiguities are resolved in favor of Indians, a "cannon of construction is not a license to disregard clear expressions of tribal and congressional intent." *DeCoteau v. District County Court,* 420 U.S. 425 at 447 (1975).

In this case, 40 years (or more) of peaceful possession was terminated by an invasion of Indians representing the tribe and (allegedly) the United States (Appendix to Petition, p. C19). The Iowa landowners were granted relief from trespass in the state courts, but the Indian invasion was sanctioned and the Tribe and the United States were granted possession by Judge McMannus on June 5, 1975, against all rules of equity relating to peaceable possession because the Plaintiffs (Respondents here) were Indians and "a preliminary injunction is an appropriate provisional remedy when special federally protected rights of Indians are threatened." (App. 123).

Despite language seemingly granting the State of Iowa status to challenge the temporary injunction, physical possession of her sovereign land was summarily granted to the Tribe by Judge McMannus of the Northern District of Iowa on October 7, 1975 (See Order of that date in records).

This Court should clarify Indian law so it is beyond question that the duty of special consideration to Indian tribes devolves upon the Executive branch only. Just as the Legislative branch remains free to enact without fetter any legislation affecting Indian tribes, including the unilateral termination of Indian Treaty provisions, *The Cherokee Tobacco,* 11 Wall. (78 U.S.) 616 (1871), *Thomas v. Gay,* 169 U.S. 264 (1898), so the judiciary

must remain impartial, favoring naught but equity and the Constitution and just application of both.

A rule that the executive, as guardian of its Indian wards, must interpret the laws to the Indians' favor, may arguably be equitable. *Joint Tribal Council of Passamaquoddy v. Morton,* 528 F. 2d 370 (1st Cir., 1975). But such cases should apply to the executive, not the judiciary.

Inferior tribunals have come to believe that there is a requirement for judicial partiality for Indian claims, because in the past the Tribes often lacked effective legal representation. But it is clear that today the Indians are well represented by the United States and the Department of Justice, with all its resources. Moreover, in this case, the tribe is also represented by an attorney of the tribe's choice, under contract to the Executive Branch of the Federal Government, and paid by federal funds.

The result of this historical bias is an inequitable predisposition in the lower federal courts in favor of Indian claims, even when, as here, the actor is not man but a river.

II.

The holding of the Eighth Circuit is contrary to the congressional intent in enactment of 25 U. S. C. § 194.

In applying 25 U. S. C. § 194 to the facts of this case, the Eighth Circuit has cast the burden of proof upon

a state and one of its agencies by designating them as a "white person" within the meaning of § 194. The State of Iowa and its agency should not be so classified.

In labeling a state as a "white person", the Eighth Circuit erred in several respects. First, a reading of "person" to include states violates the plain meaning of the word. See *South Carolina v. Katzenbach,* 383 U. S. 301, 323 (1966), which held that a state is not a "person" under the Due Process clause of the Fifth Amendment. In addition, states have never been held to be "persons" under the Civil Rights Act of 1871, 42 U. S. C. § 1983. *Fitzpatrick v. Bitzer,* 427 U. S. 445, 452 (1976). Second, in *United States v. Perryman,* 100 U. S. 235, 237 (1880), this Court held, in the face of an argument that the words "white person", as used in the 1834 Indian Non-Intercourse Act, Act of June 30, 1834, 4 Stat. 733, meant "non-Indian", that that term means only the white race and does not mean any race other than Indian. Thus, the mixture of races in the state's citizenry precludes the Eighth Circuit's application of this statute. Section 22 of that 1834 Act contains the language that is now 25 U. S. C. § 194.

Third, prior statutes, which date back to 1790, show that the section was not intended to apply to the present facts. As indicated above, the language of § 194 comes from Section 22 of the 1834 Indian Non-Intercourse Act, which was a modification and extension of the 1822 Indian Non-Intercourse Act, Act of May 6, 1822, 3 Stat. 682. The § 194 language in the 1822 Act used "Indians" in plural form. The 1834 Act changed "Indians" to "an Indian", which is the present form of § 194.

Fourth, the language of other sections of the 1834 Act demonstrates a deliberate effort of Congress to apply § 194 only in cases involving land problems of individual Indians. Thus, Section 11 of that Act states in relevant part:

> "That if any person shall make a settlement on the lands belonging, secured or granted by treaty with the United States to any Indian *tribe,* or shall survey or shall attempt to survey such lands, or designate any of the boundaries by marking trees or otherwise, such offender shall forfeit and pay the sum of one thousand dollars." (Emphasis supplied.)

Section 12 of the 1834 Act provides, in part:

> "That no purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian *nation* or *tribe of Indians,* shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution." (Emphasis supplied.)

Section 12 in the 1834 Act also amended the language of the 1802 Indian Non-Intercourse Act, Act of March 30, 1802, 2 Stat. 141, which made any conveyance of land "from *any Indian or nation or tribe of Indians* invalid, unless conveyed by treaty or convention." The 1834 Act dropped the word "Indian" from that sentence to read "any nation or tribe of Indians," thus carefully clarifying the distinction between land owned by a tribe and land owned by an individual Indian.

Fifth, Sections 4, 7 and 8 of the 1834 Act show additional Congressional intent as to the meaning of the terms "an Indian" and "a white person" in Section 22 of that Act. All contain penalties against "any person other than an Indian", showing that Congress knew how

to make such a general classification if it chose to do so and thus that "white person" is a specific racial classification referring to a white individual. It further shows that the words "an Indian" in Section 22 of the 1834 Act refer to an individual person.

The *amici* states support the State of Iowa in urging reversal of the Eighth Circuit's application of 25 U. S. C. § 194 which threatens any state subject to Indian tribal claims.

If this Court upholds the Eighth Circuit's application of 25 U. S. C. § 194, then it must examine the constitutionality of that statute and find it facially unconstitutional under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

As shown by our arguments above and the plain wording of § 194, that statute discriminates in favor of members of the American Indian race by casting the burden of proof upon members of the white race in all litigation involving right to real property. Except under this statute, the burden of proof is always upon the *plaintiff* in virtually all cases and jurisdictions. Here the burden is determined only by one's racial ancestry. In reviewing such a racial distinction, this Court stated in *Loving v. Virginia,* 388 U. S. 1, 11 (1967):

> "Over the years, this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.' *Hirabayashi v. United States,* 320 U. S. 81, 100 (1943). At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny,' *Korematsu v. United States,* 323 U. S. 214, 216

> (1944), and, *if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.*" *Loving v. Virginia,* 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed. 2d 1010, 1017 (1967). (Emphasis supplied.)

The Eighth Circuit has failed to demonstrate that the discrimination of § 194 is "necessary" to the accomplishment of a permissible legislative objective. Its reliance upon *Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed. 2d 290 (1974) is misplaced. In *Regents of the University of California v. Bakke,* — U.S. —, 98 S.Ct. 2773 (1978) this Court discussed *Morton v. Mancari* as follows:

> "Petitioner also cites our decision in *Morton v. Mancari,* 417 U.S. 535 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In *Mancari,* we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of BIA is *sui generis.* Id., at 554. Indeed, we found that the preference was not racial at all, but 'an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to groups [,] . . . whose lives are governed by the BIA in a unique fashion.'"

In *Mancari,* this Court said at page 554:

> "Here the preference is reasonably and directly related to a legitimate, non-racially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination."

Section 194 has no "non-racially based goal". The Eighth Circuit acknowledged that the statute was premised on a policy of preferential, protectionist treatment of Indians. 575 F. 2d 632. In footnote 20 on page 632 a citation is made to a 1924 U. S. Attorney General's Opinion, 34 *Op. Attorney General* 439 (1925), which discusses this policy. The first sentence states that "from the beginning of its negotiations with the Indians, *the Government* has adopted a policy of giving them the benefit of the doubt . . . ", and the last sentence concludes "Treaties have been considered, not according to their technical meaning, but in the sense in which they would be naturally understood by the Indians."

Iowa's situation is quite unlike that described. It involves the United States and the Omaha Tribe, capably represented by their lawyers, asserting a claim to property also claimed by individuals, a corporation and the State of Iowa, also capably represented. The basis for the preferential treatment of Indians is lacking. This is not a case involving interpretation of a vague treaty which could have been worded to take property from an Indian Tribe. Title to this land will be determined (and was) by the application of legal principles of accretion and avulsion, not by interpreting the terms of the 1854 Treaty, 40 Stat. 1043. The historic basis for preferential treatment is no longer present and any "necessity" so critical to the validity of this facially discriminatory statute has disappeared.

The concern of the *amici* should be apparent. If allowed to stand, the Eighth Circuit's decision designates the state "a white person" and then casts the burden of proof upon that state to prove good title to land. A state is not a "person" for purposes of direct application of Fifth Amendment protection of property rights

but as held in *South Carolina v. Katzenbach,* 383 U.S. 301, 323-24 (1966):

> "The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union. . . . [However] objections to the Act which are raised under these provisions may be considered . . . as additional aspects of the basic question presented by the case: Has Congress exercised its powers . . . in an appropriate manner with relation to the States?"

Often a state may have no *record* title to its land, and never to its sovereign land. Now, in the Eighth Circuit, all statutory presumptions of record title are lost and race determines who has the burden when an Indian claims the land. No land in the United States is immune from such a challenge since it was all "possessed", or is now claimed to have been possessed, by an Indian tribe or tribes at one time or another. Indian Land Cessions in the United States, 18th Annual Report, Bureau of American Ethnology, Part 2 (1899). Indeed, as this court has held, *United States v. Santa Fe Railroad,* 314 U.S. 345 (1941); *Johnson v. McIntosh,* 21 U.S. 543 (1823); *Cherokee Nation v. Georgia,* 30 U.S. 1 (1831); *The Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974), aboriginal title is a possessory right and if the Eighth Circuit's decision herein is allowed to stand, any Indian tribe held to have aboriginal title under the Indian Claims Commission Act, Act of August 12, 1946, 60 Stat. 1049 (1946) would have possession under § 194. The results can be unimaginably far reaching.

III.

The holding of the Eighth Circuit that federal common law, not state law, applies is erroneous.

In its decision, the Eighth Circuit recognized the basic rule that the laws of the states determine the ownership of riparian land, citing to *Oregon v. Corvallis Sand and Gravel Co., supra.* But the court found an exception, or what it characterized as a "caveat", 575 F. 2d 620, 628, citing to *Corvallis,* at 375:

> "If a navigable stream is an interstate boundary, this Court, in the exercise of its original jurisdiction over suits between states, has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary."

Thus, to support its determination that federal, rather than state, law was applicable, the Eighth Circuit concluded that this case involved a claimed change in the interstate boundary between Iowa and Nebraska as a necessary consequence of a claimed change in the boundary of the reservation. That conclusion was erroneous. In 1943, Nebraska and Iowa entered into a boundary compact which was ratified by Congress in Act of July 12, 1943, 57 Stat. 494 (1943). That compact set the boundary line between the states at the line in "the middle of the main channel of the Missouri River," defined as the "center line of the proposed stabilized channel of the Missouri River as established by the United States engineer's office . . . " *Nebraska v. Iowa,* 406 U. S. 117, 118 (1972).

By this compact, the boundary between the states was set upon the metes and bounds description of that center

line and recognized by Congress. The determination and resolution of the issues of this case will determine title to land, but it will not alter the boundary between the two states. The Eighth Circuit quoted from *Arkansas v. Tennessee,* 246 U. S. 158 (1918), but not as fully as this Court did in *Nebraska v. Iowa, supra,* at page 176:

> "How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rule of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. . . . But *these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary from where otherwise it should be located.*" 575 F. 2d 620 at 628. (Eighth Circuit's cite italicized.)

The State of Iowa does not seek to "press back" the interstate boundary. It is her objective, and in the interest of all states appearing as *amici,* that the Courts be required to apply state law to determine title to land that exists within the borders of Iowa. It is crucial that this Court reverse the Eighth Circuit's radical departure from the general principles of river law, so recently reaffirmed in *Oregon v. Corvallis Sand and Gravel Co., supra.* As many of the *amici* states herein argued in *Corvallis,* undue confusion and forum shopping would result from the application of federal law by the federal courts and state law by state courts in adjudicating title in the same geographical area.

The Eighth Circuit's reasoning that federal common law applies because Indian trust land is involved requires consideration also.

In *Oregon v. Corvallis Sand and Gravel Co., supra,* at 370, this court held:

> " . . . Although Federal law may fix the initial boundary line between fast lands and the riverbeds at the time of a State's admission to the Union, the State's title to the river bed vests absolutely as of the time of its admission and is not subject to later defeasement by operation of any federal common law."

The Eighth Circuit distinguished this case from that authority by finding that the defendants (petitioners here) have attempted to extinguish the aboriginal title, which at one time may have been in the Omaha Tribe. 575 F. 2d 620 at 629. It cited to *Oneida Indian Nation v. County of Oneida,* 414 U. S. 661, 677 (1974), and *Confederated Salish & Kootenai Tribes v. Namen,* 380 F. Supp. 452 (D. Mont. 1974), *aff'd,* 534 F. 2d 1376 (9th Cir.), *cert. denied,* 429 U. S. 929 (1976) for support that federal common law applies. In the *Oneida* case, *supra,* land that was once possessed by the Oneida Tribe in the state of New York was ceded to the state without the approval of Congress. This Court held that a federal controversy existed within the requirements of 28 U. S. C. § 1331 and § 1362, and that federal law protects the possessory rights to tribal land. In *Namen, supra,* the defendant built a pier and wharf over a lake which was wholly within an Indian reservation. Again, this Court agreed with the Ninth Circuit that the United States, as trustee, held title to the lake bed and federal common law would determine riparian rights.

This present case is distinguishable from that authority. Here, no claim of adverse possession or illegal transfer of Indian land is involved. The question here is whether the geographic change was a result of accretion

or avulsion. The trial court's determination of this fact question was improperly overturned by the Eighth Circuit. The land in question is now situated within the boundaries of the State of Iowa by Act of Congress and Iowa was vested with title to the beds of rivers and streams when admitted to the Union of the United States. Act of December 28, 1846, 9 St. L. 117. In Iowa's case, that was eight years prior to the 1854 Treaty with the Omaha Tribe, 40 Stat. 1043, and 21 years before the Barrett Survey established the eastern boundary of the Omaha Reservation. In the *Namen* case, mentioned above, there was no question but that Indian land was involved. In *Oneida* the question of title was not decided, but this court held federal courts had jurisdiction to determine such title. The courts found that the federal trusteeship of Indian lands required federal law to be applied. The critical difference here is that *this land may not be Indian land* (indeed the trial court found it was not). To apply federal common law on the premise that Indian land is involved is a mistake analogous to the finding of previous Indian possession under 25 U.S.C. § 194. It begs the question by assuming the answer to the issue: Is the land, that now exists within Iowa's boundary, land in place after an avulsion and therefore Indian land or is it land resulting from accretion?

Decisions of this Court hold that state law should be applied to answer that question; *Oklahoma v. Texas,* 258 U.S. 574 (1922); *U.S. v. Oklahoma Gas Co.,* 318 U.S. 206 (1943); as does a prior decision of the 8th Circuit *Fontenelle v. Omaha Indian Tribe of Nebraska,* 430 F. 2d 143 (8th Cir., 1970). The Court should reverse

the 8th Circuit's attempt to re-write the rules on application of law.

IV.

The Eighth Circuit's interpretation of federal common law of accretion and avulsion is erroneous.

This Court should hold that State Law, not Federal Common Law, applies in this case as argued in Division III, but even in doing so, it should reject the Eighth Circuit's holding of what the Federal Common Law is.

The Federal Common Law and the law of Both Nebraska and Iowa, is as stated in 93 C.J.S. 750, 751, Waters § 76:

> "In determining whether an addition to land constitutes accretion, the length of time during which it is in the course of formation is not of importance. If it is formed by a gradual, imperceptible deposit of alluvium, it is accretion, but, if the stream changes its course suddenly and in such manner as not to destroy the integrity of the land in controversy and so that the land can be identified, it is not accretion."

The Eighth Circuit's decision rejects this principle of law and the authority of *Nebraska v. Iowa,* 143 U.S. 359 (1892). That case held that the identity of fast land in place is the essential factor in designating a channel change as avulsive rather than accretive and not the speed of the erosion and deposition of the land. The rejection of this reasoning creates a conflict with a long line of cases in this Court, other federal courts and state courts which have followed the holding of *Nebraska v. Iowa, supra.* See *Oklahoma v. Texas,* 260 U.S. 606, 637

(1923); *Louisiana v. Mississippi,* 384 U.S. 24; Special Masters Report, pp. 14, 15, 16; *Nebraska v. Iowa* 406 U.S. 117 (1972); *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313, 326 (1973), (overruled on other grounds, *Oregon v. Corvallis, infra); Mississippi v. Arkansas,* 415 U.S. 289, 291 (1974); *Oregon v. Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977).

See also, *Conkey v. Knudsen,* 143 Neb. 5, 8 N. W. 2d 538 (1943) vacating 141 Neb. 517, 4 N. W. 2d 290 (1942); *Independent Stock Farm v. Stevens,* 128 Neb. 619, 259 N. W. 647 (1935); *Iowa R. R. Land Co. v. Coulthard,* 96 Neb. 607, 148 N. W. 328 (1914). These and several other state cases—*Yutterman v. Grier,* 112 Ark. 366, 166 S. W. 749, 751 (1914); *Longabaugh v. Johnson,* 321 N. E. 2d 865, 867 (Ind. App. 1975); *Coulthard v. Stevens,* 84 Iowa 241, 50 N. W. 983, 984 (1892); *McCormick v. Miller,* 239 Mo. 463, 144 S. W. 101, 103 (1912); *Attorney General ex rel. Becker v. Bay Boom Wild Rice & Fur Farm,* 172 Wis. 363, 178 N. W. 569, 573 (1920)—which discuss identifiable land in place as one of the key factors in a finding of avulsion, all ultimately rely on either *Nebraska v. Iowa, supra,* or *Benson v. Morrow,* 61 Mo. 345 (1875). The Eighth Circuit reads the *Nebraska v. Iowa* case as an expansion rather than a limitation of the scope of avulsion, 575 F. 2d at 636. Such reasoning, nevertheless, does not allow two totally different concepts to govern in the same situation. Avulsion must be determined either by identifiable land in place or by the speed of the channel change.

The clearest example of the conflict of this decision with prior case law appears in the Special Masters report in *Louisiana v. Mississippi,* 384 U. S. 24 (1966), which asked the question:

> "Can there be an avulsion where the entire change in the channel takes place in the same riverbed, leaving no surface land between the two channels?"

The Master then answered the question in the negative, stating:

> "The Special Master's study of the applicable case law leads to the conclusion that there are but two rules—or rather one long-standing general rule and its exception—which can be applied to river boundary changes. The general rule is that the boundary follows the changes in the main navigable channel. The exception is that when there is a cutoff, natural or artificial, the old bend that has been cut off remains the boundary in that particular area. Louisiana contends that since the cutting of the new deep-water channel was not altogether a gradual process of erosion and accretion, it must be an avulsion.
>
> "This contention is untenable. All case law and all reasoning behind these rules point to the opposite conclusion—that the general rule of the 'live thalweg' is preferable and will be applied in all cases, unless there has been a clear and convincing avulsion. This avulsion must be sudden and perceptible . . . we have been unable to find any case, with facts similar to the instant case, in which an avulsion has been found by the Court where the river remains in the same bed of the stream. In all such cases the new channel was formed when the river 'suddenly leaves its old bed and forms a new one. . . .' *Arkansas v. Tennessee,* 246 U. S. 158, 173."

Special Master's Report, p. 17, confirmed, *Louisiana v. Mississippi, supra* (19-6).

The amici states urge the Court to reverse the holding of the Eighth Circuit on the federal common law of accretion and avulsion.

V.

The Eighth Circuit erred in reversing the trial court's findings of fact.

Nowhere in the opinion of the Eighth Circuit does it expressly state that it overrules the trial court's findings of fact. However, by holding that the Petitioners (Defendants below) failed to sustain their burden of proof and holding directly contrary to the trial court's findings in many instances (Appendix to Petition, pp. A39-40, pp. A44-45, pp. A48-49, p. A55, p. A56, and p. A65) that was the effect.

The Eighth Circuit has improperly substituted its evidentiary judgment for that of the trial court, which heard the witnesses and saw the exhibits and their interrelationship. This Court has long rejected that type of appellate review, leaving factual determination to the trial court. Rule 52a F. R. C. P.; *Zenith Corp. v. Hazeltine,* 395 U. S. 100 (1969).

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CONCLUSION

This is a case of major national significance. This brief is joined by states representing every circuit. The radical departures from traditional concepts governing title to riparian lands, as espoused by the Eighth Circuit,

should be reversed by our highest Court and the judgment of the trial court reinstated.

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